

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

CITY OF ROCKFORD,) Docket No. 17 C 50107
)
Plaintiff,) Rockford, Illinois
) Tuesday, August 8, 2017
vs.) 9:00 o'clock a.m.
)
MALLINCKRODT ARD, INC.,)
et al.,)
)
Defendants.)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE IAIN D. JOHNSTON

APPEARANCES:

For the Plaintiff: HAVILAND HUGHES
(201 South Maple Avenue,
Suite 110,
Ambler, PA 19002) by
MR. DONALD E. HAVILAND, JR.
MR. WILLIAM H. PLATT, II

MEYERS & FLOWERS, LLC
(3 North Second Street,
Suite 300,
St. Charles, IL 60174) by
MR. PETER J. FLOWERS
MR. JONATHAN P. MINCIELI

CITY OF ROCKFORD
DEPARTMENT OF LAW
(425 East State Street,
Rockford, IL 61104) by
MR. IFEANYICHUKWU C. MOGBANA

For the Defendant
Mallinckrodt ARD, Inc.: BRYAN CAVE LLP
(211 North Broadway,
Suite 3600
St. Louis, MO 63102) by
MR. HERBERT R. GIORGIO
(1201 West Peachtree Street,
14th Floor,
Atlanta, GA 30309) by
MR. GEORGE P. WATSON

1 WILLIAMS McCARTHY LLP
2 (120 West State Street,
3 Rockford, IL 61105) by
4 MR. SCOTT C. SULLIVAN

5 For the Defendant SKADDEN ARPS SLATE MEAGHER & FLOM
6 United BioSource (155 North Wacker Drive,
7 Corporation: Suite 2700,
8 Chicago, IL 60606) by
9 MR. ERIC J. GORMAN
10 (4 Times Square,
11 New York, NY 10036)
12 MR. JAMES A. KEYTE
13 MR. EVAN R. KREINER

14 Also Present: MR. DONALD LOHMAN
15 In-House Counsel
16 Mallinckrodt ARD, Inc.

17 Court Reporter: HEATHER M. PERKINS-REIVA
18 327 South Church Street
19 Rockford, IL 61101
20 (779) 772-8309

21

22

23

24

25

1 (The following is from a tape-recording of proceedings:)

2 THE CLERK: Calling 17 CV 50107, City of Rockford vs.
3 Mallinckrodt ARD, Inc., et al.

4 THE COURT: All right. So the first thing we are
5 going to do is plaintiffs go on that side and defendants go on
6 that side.

7 All right. Let's try to do this in an orderly
8 fashion. Let me get appearances for the City of Rockford. I
9 see Mr. Mogbana.

10 MR. FLOWERS: Good morning, your Honor. Pete Flowers
11 on behalf of the City of Rockford.

12 THE COURT: Okay.

13 MR. HAVILAND: Don Haviland for the City of Rockford.

14 MR. MINCIELI: Jonathan Mincieli for the City of
15 Rockford.

16 MR. PLATT: Bill Platt, City of Rockford.

17 THE COURT: Okay. And Mr. Mogbana.

18 All right. I can't find you on this list,
19 Mr. Sullivan.

20 There you are. Okay. Go ahead.

21 MR. SULLIVAN: Good morning. Your Honor, on behalf
22 of the Mallinckrodt defendants, Scott Sullivan. With me is
23 Pat Watson, Herbert Giorgio, and in-house counsel Don Lohman.

24 THE COURT: And then Don. Do I have an appearance?

25 MR. SULLIVAN: He is just here observing, your Honor.

1 THE COURT: Okay. All right.

2 United BioSource?

3 MR. GORMAN: Good morning, your Honor. Eric Gorman,
4 Skadden Arps, on behalf of United BioSource, and with me is my
5 partner James Keyte as well as my colleague Evan Kreiner.

6 MR. KREINER: Good morning.

7 THE COURT: Good morning. Okay.

8 All right. I have circled with a star and three
9 exclamation points in my notes "Need to keep case under
10 control." So we are going to do that -- or I'm going to do
11 that. I clearly haven't done it very well so far.

12 We had a status or a motion previously. We set a
13 briefing schedule on a 12(b)(2) and a 12(b)(6) motion. I
14 don't know if I had everybody present. I don't think I had
15 anybody from United BioSource. For that, you can just send up
16 Roy Leaf. He can come up. He can say a couple of words. He
17 can see his mom. Everybody will be happy, okay?

18 So let's talk about the 12(f), potential 12(f), which
19 are disfavored and can be useless, and the MJOP. So the
20 judgment on the pleadings, what are you talking about?

21 Wait. That came out the wrong way. What would that
22 entail? What would be the issues?

23 MR. FLOWERS: We think it is a pretty straightforward
24 issue in terms of what Mallinckrodt has already agreed to as
25 part of its resolution with the FTC case. Obviously, there is

1 going to be some factual issues that we were hoping to see
2 their motion to dismiss to be able to gauge whether, in fact,
3 we are going to file that motion, but we wanted to put it out
4 there for the court that if the facts are as we have pled,
5 that we think a motion for judgment on the pleadings might be
6 appropriate.

7 THE COURT: Okay. Well, if they are filing just a
8 motion to dismiss and there is no answer, what would you be
9 waiting to see?

10 MR. FLOWERS: We don't know -- we just saw in their
11 Rule 26 report statement some of the bases for the Rule 12
12 motion, despite having a couple of conferences about it. We
13 now know that they are challenging standing, Illinois Brick,
14 and a couple of other fact-laden issues. So, again, when we
15 had the conference, your Honor, we thought that it was
16 appropriate to raise that issue because we think the fact
17 issues are pretty straightforward, but I do see some factual
18 contested issues coming down the line, especially our status
19 as a direct purchaser. We now see they are going to challenge
20 that. We expect they are probably going to put some factual
21 proffer out there in their Rule 12 motion, and we are going to
22 want discovery on that.

23 THE COURT: Well, the only thing they can add facts
24 to would be the 12(b)(2). 12(b)(6), they are stuck with
25 whatever you pled. So unless you pled really bad things, and

1 I don't know, what would the factual disputes be?

2 MR. FLOWERS: We are comfortable with the pleading.
3 When I saw Illinois Brick and I saw standing in their
4 defensive posture, which is the statement -- I suppose we are
5 going to see an argument on that. The facts pled support our
6 theory.

7 THE COURT: Okay. On the standing, since it is -- I
8 mean, that can be a 12(b)(1) or a 12(b)(6). It sounds like
9 you are doing it as a 12(b)(6).

10 MR. WATSON: We are doing it as a 12(b)(6). It is
11 Illinois Brick, so it is more the elements of a claim than
12 constitutional standing.

13 THE COURT: Right.

14 MR. WATSON: And we are not intending to put any
15 factual evidence in. We are going to attack the pleadings as
16 pled.

17 THE COURT: Okay. Okay. Who was thinking about
18 doing a motion to strike?

19 MR. WATSON: That was Mallinckrodt.

20 THE COURT: And what would be the basis?

21 MR. WATSON: It was going to be a narrow motion to
22 strike the allegations that were taken from the FTC complaint.
23 There is some very good authority from the Northern District
24 of Illinois on that point recognizing that all the -- such
25 motions are generally disfavored, that in that circumstance, a

1 motion to strike is appropriate, and I would note that the
2 consent order in this case specifically says on its face that
3 it is not to be used in evidence in any civil proceeding or
4 other proceeding going forward. So that's what the motion to
5 strike would deal with.

6 THE COURT: Okay. All right. If you win on a motion
7 to strike, does it advance the case?

8 MR. WATSON: It narrows the issues in our opinion.

9 THE COURT: Can't they just come back with something
10 else?

11 MR. WATSON: Possibly. They could replead it in a
12 certain way, but that's always the danger on a motion to
13 dismiss in general.

14 THE COURT: Well, that's true.

15 So if there were going to be cross motions, I just
16 would have had a briefing schedule and had everybody hit the
17 launch button at the same time, and then you guys can throw
18 the paper back and forth at each other for however long it
19 takes to work out the pleadings, and then hopefully it will be
20 one organized, giant stack of paper before Judge Kapala
21 instead of a series of different ones he has got to wade
22 through.

23 Do you still anticipate a judgment on the pleadings
24 motion?

25 MR. FLOWERS: No, your Honor --

1 THE COURT: Okay.

2 MR. FLOWERS: -- based on what we have seen through
3 our Rule 26(f) conference.

4 THE COURT: All right. Let's see if I can get the
5 complaint up.

6 The class -- obviously, the City of Rockford is the
7 class rep in this case. Are there going to be -- when I read
8 the class rep definition, it seemed like it could include
9 other Illinois municipal bodies. Could it?

10 MR. FLOWERS: That's correct, your Honor.

11 THE COURT: All right. How about other municipal
12 bodies outside Illinois?

13 MR. FLOWERS: Yes.

14 THE COURT: Okay. I don't know municipal law outside
15 Illinois. I only know Illinois municipal law. So under
16 Illinois municipal law, can a municipal body be included in a
17 class action when it is only an opt-out class?

18 MR. FLOWERS: So there have been --

19 THE COURT: Municipal body needs to -- can only act
20 through the corporate authorities -- village board, city
21 council, those types of things, county board -- and it needs
22 to take an affirmative step to enter litigation. If it is
23 knocked out, how do we work that?

24 MR. FLOWERS: So they are having classes certified in
25 the drug arena for just that. There has been a case where the

1 City of San Francisco sued, was certified as a class
2 representative in an opt-out (b)(3) situation where the
3 municipal authority has to elect to opt out of the case in
4 order to capture the entire marketplace.

5 THE COURT: And would that be San Francisco? Unless
6 there is a city of San Francisco in Illinois, and I don't know
7 of one. Did that include Illinois municipalities? I mean, I
8 don't know California law --

9 MR. FLOWERS: Yes, your Honor.

10 THE COURT: -- municipal law.

11 MR. FLOWERS: What I'm suggesting is this is a very
12 finite group of people. The class is not as expansive as you
13 may see in other cases. We have got about 800 or so patients
14 a year. So the payors are very limited, too. So I would say
15 that the vast majority of municipalities are likely not in the
16 class. So we are dealing with a very finite group of people.
17 It just so happens the City of Rockford has two patients in
18 one calendar year. So it has a very strong position as a
19 representative plaintiff in this case.

20 THE COURT: Okay. What I don't want
21 happening -- going back to my "keep the case under control,"
22 what I don't want happening is municipalities coming in at the
23 end of the process saying, "Hey, we didn't want to be part of
24 this class. We got notice." Anybody who did Illinois
25 municipal law knew there was a whole thing with the Ford

1 Intruders and Ford deciding not to sell Intruders to municipal
2 bodies, and then they all said, "Well, we didn't know we were
3 part of a class member," and there was a huge dustup, and it
4 sent the case into chaos. I don't want the case ever going
5 into chaos, so that's why I'm raising it now.

6 All right. There is three other cases that may or
7 may not be a parallel proceeding. Do you think they are?

8 MR. FLOWERS: We think they are.

9 THE COURT: Okay.

10 MR. FLOWERS: The obvious one is the FTC case where
11 Mallinckrodt was prosecuted by the FTC and settled, and that
12 gets us right to the body of the evidence that we think we
13 should have at this point in time so we can stand in the shoes
14 where the FTC left off.

15 The next case is the civil action that was brought by
16 a competitor, Retrophin, which takes us back to the beginning
17 of where we think the monopolization happened because Questcor
18 came in and took the competitive drug from Retrophin, and they
19 were accused by none other than Martin Shkreli as being a
20 price gouger.

21 And then the last case is the prosecution of
22 Mr. Shkreli himself, which if you read the headlines, he was
23 convicted on three counts, and he is awaiting sentencing.
24 This morning I saw a calendar, your Honor, that kind of
25 tracked our schedule, for briefing on posttrial issues in the

1 Shkreli case, on our track into October. Our main concern
2 with that -- I know your Honor wants to hear issues -- is we
3 think Mr. Shkreli is a fact witness, and we would rather have
4 him out of jail rather than in jail, and we would like to
5 reach out to his counsel about scheduling a deposition at a
6 convenient time.

7 So we think all of those cases are related because
8 they all revolve around the Acthar monopolization claim that
9 we brought.

10 THE COURT: Can he take 5 at this point?

11 MR. FLOWERS: I don't believe so. He has been
12 prosecuted.

13 THE COURT: Are they going to -- was he found not
14 guilty on those other five counts or was it a mistrial?

15 MR. FLOWERS: He was found not guilty on three
16 counts, but there is a civil action by the company against him
17 individually, which was stayed, I believe, pending the
18 resolution of the criminal case.

19 THE COURT: Okay. All right. You say they are not
20 parallel?

21 MR. WATSON: We say they are not parallel. Start
22 with the easy ones. The Shkreli criminal prosecution,
23 obviously, has nothing to do with this litigation. It is a
24 different company. The charges have nothing to do with the
25 allegations in this case, which have to do with a distribution

1 system that Mallinckrodt has for its drug Acthar and the
2 acquisition of a potentially competitive drug by a license
3 agreement.

4 The civil case that they are talking about, the
5 Retrophin case, it is -- again, in some far off sense you
6 could say it is relevant because they have copied the
7 allegations from that case in some ways. We think those get
8 knocked out on the motion to dismiss.

9 And then the third one is the FTC investigation,
10 which is, as we have already said, the consent order on its
11 face can't be used in this litigation. So this isn't like a
12 DOJ investigation with the guilty plea where you have some
13 legal significance of the guilty plea and follow-on antitrust
14 litigation. The FTC consent order has no such effect.

15 THE COURT: Okay. The FTC litigation, there is a
16 consent order. It sounds like it settled. Is there a
17 judgment in that or does the consent order have a period of
18 time by which it extends into the future?

19 MR. WATSON: Do you know the answer to that one, Don?

20 MR. LOHMAN: Six months.

21 MR. WATSON: It is just a consent order. There is no
22 judgment. We had, as part of the consent order, the company
23 had to pay a fine, and they had to license the product at
24 issue, which has now been done.

25 THE COURT: Okay. Has the case been terminated? If

1 I were to go onto the docket system, would it show terminated?

2 MR. WATSON: I was not involved in that, your Honor.

3 MR. LOHMAN: I don't know, your Honor.

4 THE COURT: Okay. All right. Okay. Those were my
5 questions. It looks like you have got a lot of fact
6 witnesses, potential experts. I assume you are going to have
7 retained experts on if the antitrust matter goes forward. You
8 are going to have experts on that.

9 Are the parties interested in a settlement conference
10 at all? We don't have to have one, but if you want one, I
11 will make myself available.

12 MR. FLOWERS: Your Honor, from the plaintiff's
13 perspective, we are open and available to discuss anything at
14 any point in time. We were under the impression that at least
15 one of the defendants wasn't interested at this point,
16 although they put something in their Rule 26 disclosure which
17 seems to indicate that we hadn't given a concrete settlement
18 proposal, but, in fact, we were of the opinion based on our
19 conversation that they weren't interested in having
20 discussions at this stage.

21 THE COURT: Okay. I'm not going to -- look,
22 Mr. Sullivan will tell you I don't make anybody come to a
23 settlement conference. If both sides want to have a
24 settlement conference, you can have a settlement conference.

25 MR. WATSON: And I think he was talking about UBC and

1 not Mallinckrodt, but we -- I think both -- our position is we
2 are always willing to consider settlement offers. We think
3 the chances of this case settling prior to ruling on the
4 motion to dismiss is remote. So I wouldn't think that having
5 a formal ADR process or anything like that would be worthwhile
6 at this point.

7 THE COURT: Okay. All right. Those are my
8 questions.

9 Tell me whatever you want to tell me.

10 MR. FLOWERS: Your Honor, I think one issue is this
11 whole issue of discovery at this stage. So we both kind of
12 agree that the timetable of this case, assuming it goes
13 forward, is about 14 months. The question is --

14 THE COURT: Let me pause you right there.

15 MR. FLOWERS: Sure.

16 THE COURT: I'm looking at a sea of lawyers. Just
17 scheduling depositions with this many attorneys -- I figure
18 you all have probably a couple other cases pending -- 14
19 months seems pretty optimistic.

20 So go ahead. That's just my word of caution.

21 MR. FLOWERS: Possibly, your Honor, you are right, it
22 is a scheduling nightmare. The question, though, in that
23 respect is when does the 14 months begin. I mean, we have
24 issued our Rule 26 disclosures even though we couldn't get an
25 agreement on how to do that. We have issued discovery.

1 THE COURT: Okay. So that would be another good
2 piece of evidence as to whether 14 months is really reliable
3 if you can't agree on stuff like that. But go ahead.

4 MR. FLOWERS: True, true.

5 The issue really is when does discovery begin, does
6 it begin after the motion to dismiss is dealt with or does it
7 begin at this stage. Our position, at least, is some of the
8 simple discovery should begin at this stage so that we can get
9 the process moving. It isn't discovery that requires probably
10 a lot of action on their behalf because it is mostly documents
11 that have been gathered in these other cases, so they have
12 been previously produced. So we are of the opinion and hope
13 that we could begin at least the simple part of the discovery
14 at this stage so that the case can move along, assuming we get
15 over the motion to dismiss.

16 MR. HAVILAND: And, your Honor, if I may, to follow
17 on that, what Mr. Flowers pointed out, there are buckets of
18 documents. I don't want to oversimplify it. But in the FTC
19 litigation where Mallinckrodt PLC agreed to jurisdiction, we
20 believe there is a body of documents that led to that
21 decision. They ultimately did settle with the FTC over those
22 charges. We expect in the 12(b)(2) motion to hear that there
23 is no jurisdiction here and the reasons for it. That's going
24 to beg the question about jurisdictional discovery. But if we
25 can at least start where the government left off with a

1 consent that the company was here for purposes of that case,
2 we think we can at least get down the pathway of helping the
3 court to resolve that jurisdictional motion, among other
4 things, but it is a body of documents that exists somewhere in
5 counsel's office.

6 THE COURT: Okay. Let's go down the jurisdictional
7 rabbit hole. They are going to be filing a 12(b)(2) motion,
8 its motion unopposed, all motions to dismiss by 8/22. Okay.

9 In a couple weeks, he will be filing a 12(b)(2). You
10 haven't seen it yet?

11 MR. HAVILAND: Correct.

12 THE COURT: I assume your crystal ball is at the
13 shop. It isn't working. But do you think you are going to
14 ask for or need jurisdictional discovery or do you need to see
15 the motion first?

16 MR. HAVILAND: Likely.

17 THE COURT: Bad question by me because it is
18 compound.

19 Do you think you will need jurisdictional discovery?

20 MR. HAVILAND: More than likely, your Honor, based on
21 what we expect they are going to claim about the Irish
22 company's presence in the United States and the jurisdiction
23 of this court.

24 THE COURT: Okay.

25 MR. GORMAN: Your Honor, if I could just have a word

1 on United BioSource.

2 THE COURT: Sure.

3 MR. GORMAN: You know, frankly, we don't even
4 understand why we are named in this case. There is really no
5 antitrust theory that has us in here. We will have a very
6 strong 12(b)(6) motion. We don't think there should be any
7 discovery for any defendant going forward, but certainly until
8 those motions are decided. But certainly for UBC, it makes no
9 sense whatsoever.

10 THE COURT: Well, are you raising a 12(b)(2) motion?

11 MR. GORMAN: 12(b)(6).

12 THE COURT: You are just -- you are 12(b)(2),
13 12(b)(6). You are 12(b) --

14 MR. GORMAN: 12(b)(6).

15 MR. WATSON: Right. We are 12(b)(2) for the parent
16 company only, 12(b)(6) for both.

17 THE COURT: Okay.

18 MR. WATSON: And I obviously join in the position
19 that the defendants should not be subject to discovery until
20 the motions to dismiss are ruled on. The court and everyone
21 who practices in federal court is familiar with the Twombly
22 case, and this is what the Twombly case was all about,
23 stopping the runaway train that can become antitrust discovery
24 before the court has had an opportunity to rule on the
25 plausibility of the allegation, and we have a relatively quick

1 schedule here. I think briefing will be complete by
2 October 31st. So there is a very short time period during
3 which discovery can be stayed, but it is not -- the discovery
4 requests that have been served on us to date are anything but
5 simple. It goes far beyond anything that was produced in
6 prior cases. And even with respect to things that were
7 produced in prior cases or to the FTC, it is not as easy as
8 just pushing a button, and they are certainly not sitting in
9 counsel's office.

10 But nonetheless, it has to do with more than how fast
11 it is or how expensive it is. It is also intrusive discovery.
12 There is no legitimate reason to begin discovery now as
13 opposed to after a ruling on the motion to dismiss, when it is
14 our belief that the entire case will be dismissed. But even
15 if it wasn't, the issues would be significantly narrowed.

16 THE COURT: Okay. I never knew a defendant who filed
17 a motion to dismiss that didn't think it would be successful,
18 even when I filed them. I would cross my fingers.

19 MR. WATSON: We strenuously think it will be
20 successful.

21 THE COURT: You do have a briefing schedule on those
22 motions, even if the 12(b)(6) moves forward. It takes you all
23 of November, all of December. My best guess -- there is a lot
24 of other motions that are in the queue in front of your
25 motion, including one of yours -- a couple of yours. You have

1 got a changeover in personnel over there. Optimistically, you
2 are looking the end of February. That's my best guess.

3 MR. GORMAN: I think, your Honor -- sorry to
4 interrupt -- in the context of what will not be a 14 months'
5 case, I think it will be a couple year case, waiting for these
6 motions to be decided, I think, is very much and probably the
7 most efficient way to approach what will become quite a
8 complex and long case, and can be very much informed whether
9 it is a complete dismissal or a narrowing of the issues from
10 these motions.

11 MR. HAVILAND: Your Honor, one of the --

12 THE COURT: Hold on. I don't think he's finished.

13 MR. HAVILAND: I'm sorry.

14 MR. GORMAN: So I think in this type of very
15 complex -- again, from our perspective, UBC's perspective, it
16 is not complex, but looking at the overall case, an antitrust
17 case, you know, it does very often make great sense to hear
18 these motions, get decisions on these motions before you
19 launch into a very long, complex litigation involving experts,
20 fact issues. It can be informed quite a bit by the motion
21 practice.

22 THE COURT: Okay. What are we talking about as far
23 as ESI goes? Are they going to be electronically stored
24 information?

25 MR. HAVILAND: We have broached the topic. We didn't

1 get very far on it. We don't have an EDP plan in place. We
2 have imposed a litigation hold. I expect defense counsel has
3 done the same. But we haven't moved forward other than we
4 have done our due diligence on the plaintiff's side. We have
5 actually produced, as Mr. Flowers said, our Rule 26
6 disclosures. We have propounded discovery, interrogatories
7 and requests for production of documents, which are due next
8 week. And I wanted to say, your Honor, that there is
9 disclosed in the Rule 26(f) report a motion for a stay of
10 discovery. We have not seen that. I expect it is along the
11 lines of what we have heard today that there is a motion
12 coming to dismiss. We would like to stay discovery, but we
13 are going to have a deadline on discovery responses coming due
14 next week and a motion to stay that hasn't been filed yet. We
15 don't want to file a motion to compel and start the flood of
16 more motions for the court. So we would like to kind of --

17 THE COURT: I haven't even set a case management
18 order. So now you can file your Rule 34 motions -- or
19 motions -- or requests for documents early, but
20 interrogatories, you need to wait. I think you kind of jumped
21 the gun on that one, right?

22 MR. HAVILAND: Yes, your Honor.

23 MR. GORMAN: They actually filed interrogatories and
24 document requests while we were on the 26(f), which shows you
25 how aggressive they want to be on discovery. I'm not faulting

1 them on that.

2 I would say that we are happy to brief this issue.
3 We are happy to file the motion.

4 THE COURT: We don't --

5 MR. WATSON: I think the idea was if they got the
6 ball rolling, maybe it won't stop, but, again, it makes
7 perfect sense not to even have that ball start to roll.

8 THE COURT: I don't want briefs on a stay because
9 then you will file, and then they will file, and then you will
10 have a reply. I pretty much know what I'm going to do on
11 this, but I want to hear from the parties before I make a
12 decision.

13 MR. FLOWERS: So, your Honor --

14 THE COURT: It is kind of the right way to do it.

15 MR. FLOWERS: -- the discovery that we have
16 propounded, it has a dozen or so requests. The first couple
17 were tailored to those files in the FTC action, in the
18 Retrophin action, as I said. They were litigated cases to
19 resolution. The discovery in those cases is finite. It has
20 been produced. It is not burdensome to reproduce it.

21 We believe in those two case files we are going to
22 find much of what we need to get down the pathway, and we
23 would like to start that process now. That's why I was
24 curious as to the basis for the stay. If it is burden, I
25 don't think the burden is all that oppressive to produce a

1 case file that's already in existence, and we can talk to
2 counsel about that, how we copy it if it is in electronic
3 form, all those issues, but we didn't get very far on that,
4 other than to disclose our desire to get finite discovery.

5 THE COURT: Okay. Look, if there is going to be ESI
6 issues, go to discoverypilot.com. Go to the Seventh Circuit
7 ESI program. We have got all kinds of materials on there to
8 make it a process.

9 If they are used and reviewed and thought about and
10 cooperated with by the parties, try to make it as -- I can't
11 say "un-painful" -- less painful as possible. So that will
12 give you some guidance there.

13 If you need a protective order at any time, use the
14 model protective order that's on the court's website. Show me
15 your changes in the tracked changes, and I will review it and
16 get that back to you that same day probably.

17 I can tell you this: There is going to be no
18 depositions before the motions to dismiss are ruled on. I can
19 guarantee you that. That's not going to happen.

20 You have served -- I got the certificate of service
21 that you served your 26(a) disclosures. That was just handed
22 to me this morning.

23 Here is what we are going to do: I have got the
24 certificate of service. I don't know what you got, when you
25 got it, the volume. Did you get 26(a) disclosures?

1 MR. GORMAN: We got the 26(a) disclosures yesterday,
2 and it was two or three pages, and then an exhibit of, I
3 think, 33 witnesses that they have identified.

4 MR. WATSON: And, your Honor, from our perspective,
5 again, getting into document production and finding and
6 reviewing documents as opposed to, potentially, as a middle
7 ground, some disclosures with categories of documents and
8 names, we can understand that is a possibility. But headed
9 down the road in the context of our motion to dismiss, of
10 actually searching, producing, reviewing documents, it just
11 doesn't make any sense to us.

12 THE COURT: Okay.

13 MR. WATSON: And we don't have the same issues, also,
14 in terms of having FTC complaints and things that people want
15 that can be gathered. We have just a simple, straightforward
16 motion to dismiss.

17 THE COURT: Okay. Simple, straightforward.

18 MR. WATSON: Wait until you see it.

19 THE COURT: I'm not going to look at.

20 MR. WATSON: I know.

21 THE COURT: It is going to that chambers. I'm not
22 touching it.

23 MR. FLOWERS: Not that yours is not.

24 MR. WATSON: And I just want to emphasize, again,
25 that this is the classic case where discovery is going to be

1 stayed. It is Twombly. This is Sulfuric Acid from the
2 Northern District of Illinois. Antitrust cases, complex
3 antitrust cases, are cases that cry out for discovery stayed.

4 THE COURT: I don't know how many opinions Judge Cole
5 issued in the sulfuric acid cases. A lot. So that's a bad
6 cite.

7 MR. WATSON: I could probably give you the actual.

8 THE COURT: It was a lot.

9 MR. WATSON: It was from 2008.

10 THE COURT: I cite Judge Cole's opinions in that case
11 all the time, so there were clearly a lot of discovery issues.

12 MR. WATSON: Do you want -- the cite is 231 --

13 THE COURT: I have got it. I have got it.

14 MR. WATSON: Okay.

15 THE COURT: 26(a)(1) disclosures by September 29th,
16 okay? Full 26(a)(1) disclosures.

17 I have no idea if there is any insurance coverage on
18 any of this stuff. Has a claim been made?

19 MR. WATSON: I don't know the answer to that, but I
20 doubt it.

21 THE COURT: Well, obviously, if there is, let them
22 see the policy. That would be fun to have a carrier in on
23 this case.

24 And then what we will do is we will sit down. I'm
25 going to give you October 10th. I will put it at 1:30. And

1 that will be -- I will put that as the only case on the 1:30
2 call that day. And I will be tired and cranky, so I'm giving
3 you a warning, on that day. And we will talk about what, if
4 any, additional discovery should move forward. There will be
5 no depositions before the motions to dismiss are completed.
6 As to if and when depositions do proceed, I will put in the
7 order right now, so I don't forget, leave to depose an
8 incarcerated person will be allowed under Rule 30.

9 With this many attorneys, come up with a plan.
10 Mr. Mogbana knows my theory on it. Pick either the first or
11 the last week of each month, and you say, "This is going to be
12 the Mallinckrodt week where deps are." I don't care where.
13 Just set aside some time so that you have a block of time, and
14 that will be when your deps are, so that you are not trying to
15 figure out everybody's schedule. You just go on to your
16 system and block it off, and then you will have your deps,
17 whatever is agreeable, first, second, third week, whatever you
18 want to do, every other week, something, just so you have some
19 consistency. Otherwise, you are going to spend countless
20 hours and a lot of your clients' time and money scheduling
21 depositions, which is not a good use of anybody's resources.

22 So we will talk on October 10th in the afternoon
23 about what, if any, additional discovery will proceed. If
24 there are documents that are available, that are not difficult
25 to obtain, and there is not a lot of burden, if there is an

1 FTC file somewhere in Iron Mountain, and all you have got to
2 do is pull it out, and it is relevant, that doesn't seem
3 onerous and it seems proportionate. If it is going to involve
4 searching ten mainframes for e-mails of 12 custodians, that's
5 a different issue. So you have got the two ends of the
6 spectrum. So we will talk about it at that point, but
7 at least you will have the opportunity to review the 26(a)(1)
8 disclosures. You will, too. And so I think you will be
9 better informed on what, if any, discovery would proceed on
10 that date. You should probably talk to each other before we
11 sit down on the 10th. Just get the protective order on file
12 so that doesn't hold you up.

13 I'm not saying that discovery is moving forward, but
14 it is not hard. The reason we have the model protective order
15 is to save the countless hours. I don't know how many hours
16 we used to fight over stupid protective orders and they all
17 end up looking the same anyway.

18 MR. WATSON: Just to clarify a point, does that mean
19 that we do not need to respond to the discovery that was
20 served, that answers are due next week?

21 THE COURT: Correct.

22 MR. WATSON: Thank you, your Honor. Thank you.

23 THE COURT: But I do want to hear about that FTC
24 case, what the documents -- what the discovery looked like in
25 that case. To the extent that there is any overlap, this

1 Retrophin, it is a 2014 case in California -- nope -- yes, is
2 that still going on? Is that ongoing or is it --

3 MR. WATSON: That case is over.

4 THE COURT: Is it settled?

5 MR. LOHMAN: It was settled two years ago, more than
6 two years ago.

7 THE COURT: Okay. Okay. So the same thing with
8 that. I don't know what the discovery requests looked like in
9 that. I mean, if they just went to school and took a look at
10 what was filed in that case -- I don't know if you are the
11 same counsel -- and they just went, "Wow, this is good
12 discovery," and they lobbed that over to you and you had to
13 respond to it, well, again, proportionality, maybe it is not
14 disproportionate to say, "Here you go."

15 Now, if they were or if they had those documents,
16 then they don't need to get them from you again, okay? So we
17 will talk through those things on the 10th in the afternoon.

18 Any questions you have of me?

19 MR. FLOWERS: The only concern I wanted to raise for
20 the court is with the 12(b)(2) motion and the issue of
21 jurisdictional discovery. If there are positions
22 taken -- typically, I'm not going to suggest what the defense
23 counsel is going to do here, but if there is an affidavit
24 about the company's lack of contacts in Illinois, we are going
25 to want to respond to that and probably be seeking discovery

1 on those issues.

2 THE COURT: Hold on one second.

3 MR. FLOWERS: In the context of the briefing, which
4 is due October the 3rd.

5 THE COURT: And then your response is on the 31st.
6 So we can talk about that on the 10th as well.

7 MR. FLOWERS: Yep.

8 THE COURT: Okay.

9 MR. FLOWERS: Thank you.

10 THE COURT: Anything from you guys?

11 MR. GORMAN: Nothing from us, your Honor.

12 THE COURT: All right. Have a good day.

13 (Which were all the proceedings heard.)

14 CERTIFICATE

15 I certify that the foregoing is a correct transcript from
16 the digital recording of proceedings in the above-entitled
17 matter to the best of my ability, given the limitations of
18 using a digital-recording system.

19

20 /s/ Heather M. Perkins-Reiva August 14, 2017

21 Heather M. Perkins-Reiva Date
22 Official Court Reporter

23

24

25